CROWELL & MORING
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
CABLE: CROMOR
FACSIMILE (RAPICOM): 202-628-5116
W. U. I. (INTERNATIONAL) 64344
W. U. (DOMESTIC) 89-2448

JOHN T. SCOTT III
(202) 624-2582

June 27, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: GN Docket No. 94-33

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and four copies of the "Comments of Bell Atlantic Mobile Systems, Inc." on the Commission's Notice of Proposed Rulemaking in this proceeding.

Should you have any questions with regard to this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc: Gina Harrison
Susan McNeil
Peter Batacan

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Further Forbearance from Title II	)	GN Docket No. 94-33
Regulation for Certain Types of	)	
Commercial Mobile Radio Service	)	
Providers	)	

COMMENTS OF BELL ATLANTIC MOBILE SYSTEMS, INC.

Bell Atlantic Mobile Systems, Inc. ("Bell Atlantic"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits comments on two aspects of the Commission's Notice of Proposed Rulemaking ("Notice") in this proceeding.

First, Bell Atlantic is concerned that the Notice's concept of "selective forbearance," tied to the size of a commercial mobile radio services ("CMRS") provider, embarks the Commission on the wrong course. At this time the Commission needs to follow through on its commitment to achieve regulatory symmetry, not -- as the Notice's concept would do -- undercut it. The Commission's forbearance authority does not provide support for a size-based forbearance standard. Moreover, such a standard would fragment the regulatory structure for CMRS and place competitors under different rules. And it would entangle the Commission in complex and unending monitoring of the CMRS industry, imposing an unwarranted burden on both it and the industry.

Second, Bell Atlantic does support forbearance from applying the Telephone Operator Consumer Services Improvement Act ("TOCSIA"), 47 U.S.C. § 226, to all CMRS providers because it is unnecessary to protect CMRS consumers.

I. THE COMMISSION SHOULD NOT BASE FORBEARANCE ON CARRIER SIZE.

The ink is barely dry on the Commission's first action to implement Congress' mandate to achieve symmetry in the regulation of mobile services.[1] The Commission is in the middle of follow-on proceedings to give force to symmetry and adopt consistent rules for existing and reclassified CMRS providers.[2] The Notice, however, takes the Commission on a new path which would undermine those strides toward symmetry, by proposing that the size of a carrier may be an appropriate basis for establishing eligibility for further forbearance. Notice ¶ 32. Bell Atlantic believes that this proposal is contrary to the intent of the Budget Act, impractical and burdensome to implement, and unwise.

The Budget Act requires the Commission to consider whether forbearance will facilitate the development of a competitive CMRS marketplace, including whether it will enhance competition between providers. 47 U.S.C. § 332 (c)(1)(C).

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[1] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC No. 94-31 (released Mar. 7, 1994) ("Second Report and Order").

[2] Further Notice of Proposed Rulemaking, GN Docket No. 93-252 (FCC 94-100, released May 20, 1994); Notice of Proposed Rulemaking, CC Docket No. 94-54 (adopted June 9, 1994).

The Commission is to consider a series of factors in determining whether forbearance is justified,[3] but paramount is for the Commission to ensure regulatory parity and to ensure that forbearance does not remove necessary protections for consumers.

Congress decided that regulatory parity was the best way to promote competition in the commercial mobile services marketplace, with only limited exception. The legislative history of the Budget Act indicates that Congress contemplated allowing the Commission to forbear from regulation for some but not all CMRS providers, but only if the Commission makes a finding based on market analysis that such disparate treatment would promote competition or protect consumers. H. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess. 491 (1993). The brief discussion in the committee report nowhere indicates that Congress contemplated any distinction based on the carrier's size. Instead, differential regulation must, it said, be tied to an analysis of competition and the need to protect consumers. Thus, where competition in a particular CMRS service is particularly intense, the legislative history suggests that the Commission may forbear differently for that service. But it did not, either expressly or implicitly,

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[3] The Budget Act permits the Commission to forbear from applying Title II common carrier regulations if it determines that: (i) enforcement of such provisions is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly discriminatory; (ii) enforcement of such provisions is not necessary for the protection of consumers; and (iii) specifying such provisions is consistent with the public interest. Id. at § 332 (c)(1)(A).

direct that the Commission could regulate different-sized carriers within that service differently.

There may be instances in which the Commission can find that differential forbearance is essential to advance competition. Forbearance might be appropriate where the particular Title II provision has no relevance to the regulation of a certain service. For example, data transmission service providers might not be subject to identical rules as two-way interactive voice services due to their very different nature. But that approach is very different from the approach tentatively advanced by the Notice -- to distinguish between providers of the same service based only on size. It is not at all apparent why granting "small" providers more freedom from regulation than other carriers would achieve Congress' goals. Nor is it apparent why a "small" carrier would be less likely to engage in actions that various Title II provisions are designed to prevent or police.

Moreover, splintering the CMRS marketplace by applying forbearance to certain providers but not others would unfairly disadvantage competitors with higher regulatory burdens, particularly if the Commission decided to treat CMRS providers within a single service category differently. One provider in the marketplace might then be subject to higher regulatory burdens than another simply because it was larger or served a particular customer base. This would skew the marketplace in favor of certain providers for no rational reason. In addition, the mobile services industry is changing too fast for the Commission to

make confident judgments at this time about whether size-based eligibility for forbearance would promote competition.

Putting aside the legal difficulties in justifying a size-based "selective forbearance" standard under new Section 332, such a standard raises immense practical problems. To formulate criteria for determining which entities qualify as "small" CMRS providers, the Commission would have to attempt to establish the precise point at which a provider becomes "too large" to qualify for further forbearance. There is no evidence that there even exists such quantifiable data. Even if it selected some point, it would face complex issues that would embroil it in an unending effort to distinguish between small and large carriers. The Notice flags only a few such problems. Others abound. How, for example, would it classify a carrier which had a tiny presence in one geographic area, but a larger presence in a different geographic area? How would it treat a carrier which had a tiny share of one type of CMRS, but a larger share of another type? How would it treat minority interests?

The Commission suggests using several tools, including revenues per subscriber, percentage of individual traffic, number of mobile units, average number of customers, average subscriber rate, number of channels, and half the current average cellular rate. Notice ¶¶ 34, 36. None of these present feasible solutions to the intractable problems which would be created by a size-based approach to forbearance.

The Commission's concept of a "revenues" test illustrates this problem. While the Notice appears to presume that identifying a benchmark would be simple, in fact carriers' revenues fluctuate greatly, and are heavily dependent on seasonal variations and conditions in the overall economy. A carrier's revenues are likely to fluctuate above and below the benchmark, even if yearly figures are used. The Commission would be forced to adopt detailed financial monitoring, a step flatly at odds with its forbearance initiatives.

Nor is there any conceivable basis for believing that providers that charge less than half the current average cellular rate merit forbearance, whereas providers that charge more do not.[4] First of all, such a concept wrongly assumes that cellular service is functionally equivalent to other types of mobile service. In fact, cellular carriers provides numerous services and benefits, such as roaming, which are not available through other mobile services. There is thus no logical basis to use cellular rates as a benchmark for CMRS forbearance. In any event, the Commission has already decided to forbear from Title II's tariff and rate prescription provisions based on the finding that the CMRS marketplace is competitive and there is no need for full-scale regulation of cellular or any other

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[4] The Commission's reference of an alleged "average" cellular rate displays the inevitable flaws with the concept. While it asserts that "cellular companies now charge about $65 on average," that figure is well over the mark, based on old, 1992 data. Notice at ¶ 34 n. 85. Even if some agreed-upon monthly benchmark figure were to be created, it would distort the CMRS market, by encouraging carriers to devise pricing plans which "met" the benchmark, such as raising up-front charges to keep monthly rates below the level where "small" status would be lost.

CMRS service. See Second Report and Order at ¶ 173. It is not clear why, then, cellular rates would serve as a relevant measure to determine when to grant additional forbearance to "other" carriers. Such an apples-to-oranges comparison does not comply with the Section 332 tests for forbearance.

In addition to the pitfalls of attempting to designate the appropriate characteristics of a "small" CMRS provider, the Commission also fails to recognize the burdens that implementation of differential forbearance would place on its staff. While the Commission acknowledges that the proliferation of affiliations and mergers in the industry raises a series of questions regarding its definition of "small" CMRS providers, Notice ¶ 35, the Commission does not contemplate the continuing administrative costs that would be necessary to police compliance with its differential forbearance proposal, as well as the uncertainties that it would create.[5]

If the Commission believes that some providers may in fact suffer disproportionately from regulation and that competition will therefore be adversely affected, the Commission can, at a later date, allow a CMRS provider to demonstrate on a case-by-case basis that it should enjoy special forbearance from a particular provision. This approach, suggested at ¶ 38 of the Notice, will enable the Commission to make real distinctions between CMRS providers instead of

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[5] A size-based test would, if anything, harm the public interest by supplying a real disincentive for small carriers to expand their subscriber base by offering new technologies or services, since expansion would bring with it greater regulatory burdens.

sweeping generalizations based on assumptions about market behavior, generalizations which would undermine the Commission's priority responsibility of building a consistent regulatory structure for CMRS.

II. THE COMMISSION SHOULD FORBEAR FROM APPLYING TOCSIA TO CMRS PROVIDERS.

Although the Commission does not specifically propose to forbear from any further Title II provisions, it seeks comment on whether it should forbear from several Title II provisions, including Section 226 dealing with operator services. Id. at ¶ 20. The Commission should forbear from imposing the burdens of Section 226 on CMRS carriers. Section 226 was designed to correct practices in the landline telecommunications market. Its enforcement against the CMRS industry would expand it far beyond its original purpose, and is, moreover, unnecessary to protect CMRS subscribers.

In the mobile services marketplace, the application of Section 226 is not necessary to ensure reasonable rates, the first prong of the statutory test for forbearance. 47 U.S.C. at § 332 (c)(1)(A)(i). The Commission has already decided to forbear from its Title II tariffing requirements because the CMRS marketplace is sufficiently competitive to ensure that rates will be reasonable, and, with expansion of SMR and introduction of PCS, it will become even more competitive. Second Report and Order at ¶ 177. Imposing a tariffing requirement under Section 226 would be at odds with the Commission's decision to forbear from the tariffing requirements of Section 203.

In addition, the application of Section 226 is not necessary to protect consumers in the commercial mobile services marketplace. See 47 U.S.C. § 332 (c)(1)(A)(ii). Neither that provision nor its legislative history considers the mobile services industry, and there is no evidence that the practices in the landline operator services market which provoked Congress to enact TOCSIA also occurred, either then or now, in the mobile services market. Where wireless carriers require customers to use their credit cards to bill interexchange calls, that practice is designed in part to protect customers from toll fraud, and should not thereby saddle the carrier with the many regulatory burdens of Section 226. TOCSIA, its goals, and its requirements on the landline industry, simply do not fit the mobile services industry.

Finally, application of Section 226 is unwarranted because it would burden the emerging CMRS industry. See 47 U.S.C. § 332 (c)(1)(A)(iii). Commenters in the initial phase of CC Docket No. 93-252 detailed those burdens and the related costs. See, e.g., Comments of Telocator and GTE, filed Nov. 8, 1993. There are no countervailing benefits to applying Section 226 to CMRS.

CONCLUSION

Forbearance based on carrier size would mire the CMRS marketplace in uncertainty and the Commission in unending monitoring. The mere fact that a provider is small says little about its ability or incentive to behave in a manner adverse to consumers. Any categorical attempt by the Commission to quantify the

exact size, number of subscribers, or other factors that would trigger further forbearance is legally unwarranted and simply impractical. The process of attempting to establish such criteria and then apply them will endlessly burden the Commission and undo the benefits of general CMRS forbearance. The Commission should therefore not adopt a size-based standard for further forbearance. It should, in this proceeding, forbear from applying Section 226 to all CMRS carriers.

Respectfully submitted,

BELL ATLANTIC MOBILE SYSTEMS, INC.

By: 

John T. Scott, III
Charon J. Harris
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

Its Attorneys

June 27, 1994